

<p>DISTRICT COURT, BOULDER COUNTY, COLORADO Court Address: 1777 SIXTH STREET P.O. BOX 4249, BOULDER, CO, 80306-4249 THE PEOPLE OF THE STATE OF COLORADO V. Defendant(s) AHMAD AL ALIWI ALISSA</p>	DATE FILED: March 23, 2021 3:06 PM CASE NUMBER: 2021CR497
△ COURT USE ONLY △	
Case Number: 2021CR497 Division: 13 Courtroom:	
Order: MOTION TO ALLOW THE DEFENSE EXPERT TO BE PRESENT FOR SCIENTIFIC TESTING AND/OR REVIEW OF EVIDENCE (D-002)	

The motion/proposed order attached hereto: ACTION TAKEN.

Colorado law allows for defense experts to be present for consumptive testing only. C.R.S. 16-3-309; People v. Gomez, 596 P.2d 1192, 1197 (1979). Therefore, where the People are notified that consumptive testing may be necessary, they shall notify Defendant and allow a reasonable opportunity for Defendant's expert to be present during the consumptive testing. Consumptive testing is defined as testing that renders evidence incapable of independent analysis by the defendant's experts. § 16-3-309(1), C.R.S. ("When evidence seized in so small a quantity or unstable condition that qualitative laboratory testing will not leave a sufficient quantity of the evidence for independent analysis by the defendant's expert"); Gomez, 596 P.2d at 1197. ("[I]n those cases where the amount of material available for testing is small . . . it may be incumbent on the state to contact the defendant to determine whether he wishes his expert to be present during the tests."); People v. Garries, 645 P.2d 1306, 1310 (Colo. 1982) ("The guidelines established in Gomez are applicable to all cases where the test sample is insufficient to allow independent analysis."). Alteration of the evidence, even if the alteration is irreversible, is not consumptive testing so long as the defendant is allowed the opportunity to conduct an independent analysis. Gomez, 596 P.2d at 1197-98. The motion is denied in all other respects as Colorado law does not mandate the presence of defense experts during nonconsumptive testing.

Issue Date: 3/23/2021



THOMAS FRANCIS MULVAHILL
 District Court Judge

District Court, Boulder County, Colorado Court Address: 1776 6 th Avenue Boulder, CO 80306	THE PEOPLE OF THE STATE OF COLORADO v. Ahmad Alissa, Defendant.	σ COURT USE ONLY σ
Megan Ring, Colorado State Public Defender Samuel Dunn #46901 Senior Deputy State Public Defender Kathryn Herold #40075 Supervising Deputy State Public Defender Boulder Regional Public Defenders 2555 55TH Street D-200, Boulder, CO 80301 Phone: (303) 444-2322 Fax: (303) 449-6432 E-mail: boulder.defenders@state.co.us	Case No. 21CR497 Division 13	
MR. ALISSA'S MOTION TO ALLOW THE DEFENSE EXPERT TO BE PRESENT FOR SCIENTIFIC TESTING AND/OR REVIEW OF EVIDENCE (D-002)		

Mr. Alissa, through counsel, asks this Court enter an order allowing the defense to have a confidential expert present during any scientific testing of evidence by law enforcement or prosecution agents in this case, and prosecutions:

1. The prosecution, through law enforcement or other agents, may perform various forms of testing involving items of evidence.
2. In doing so, the prosecution's agents apply various scientific procedures and methods of their own choosing to the evidence.
3. While such testing may not destroy the existing evidence, the evidence that is developed as a result of such scientific testing normally consists of the observations and subsequent testimony of the prosecution's experts as to the methods and procedures which were employed, and their observations of the results thereof. Unless Mr. Alissa is permitted to have his own confidential expert present during those procedures and tests, he will have lost any realistic ability to confront the prosecution's evidence as to the procedures performed and the results obtained. The prosecution's experts will have sole and virtually unchallengeable control of the evidence generated as a result of those tests.
4. Further, such testing may **destroy** the existing evidence. For example, bullets in evidence may be fired, and the condition of other evidence may be altered by the testing. In such situations,

Mr. Alissa has a due process right pursuant to the Constitution of the State of Colorado and the United States Constitution to have his own confidential expert be present at such testing.

5. Mr. Alissa requests the opportunity to have his own representative expert observe the scientific procedures and tests performed by the prosecution or its agents. Such an expert would not participate in or in any fashion interfere with or influence the prosecution's testing procedures. Such an expert would enable Mr. Alissa to have reasonable access to the evidence and a reasonable opportunity to confront – as guaranteed by the Constitution of the State of Colorado and the United States Constitution – that sort of evidence in this case, and in this instance the requested relief is virtually the only method of allowing Mr. Alissa access to the evidence and an ability to effectively confront such evidence in court.
6. The prosecution will be in no way prejudiced by allowing the defense to have a confidential expert present during the testing procedures. The only consequences of allowing Mr. Alissa to have an expert present at the prosecution's scientific testing of evidence is a significant enhancement of the reliability of the truth-seeking function of this case, and the protection of Mr. Alissa's right to effective assistance of counsel. It is well-recognized that the right to counsel may include the assistance of confidential experts, *see, e.g. Miller v. District Court*, 737 P.2d 834 (Colo. 1987); *Hutchinson v. People*, 742 P.2d 875 (Colo. 1987).
7. The prosecution has no privileges or rights to confidentiality or secrecy at any point in such testing. No "work product" is involved. Since their work is intended to generate evidence which may be used in court, the police and other prosecution agents have no legitimate reasons for keeping their methods or procedures from the strictest scrutiny of Mr. Alissa, a man accused of Murder in the First Degree.
8. Additionally, Mr. Alissa moves that the court order the prosecution to refrain from performing any additional scientific testing on the evidence in this case until the issues presented by Mr. Alissa motions to have confidential defense experts present at such scientific testing are resolved, for the following reasons:
 - a. Mr. Alissa has filed the motion above, and he expects that the issues raised therein can and should be resolved in an expeditious manner. The prosecution would suffer no prejudice from a delay.
 - b. Testing of the evidence in this case would potentially be exculpatory as to issues which are material to the defense. There is a manifest necessity that a defense expert be present in order to properly document and preserve potentially exculpatory evidence.
 - c. The prosecution and court are on notice that initial testing may destroy evidence that cannot be replicated by duplicative testing. The prosecution and court are also on notice that testing performed without the presence of Mr. Alissa experts will deprive Mr. Alissa of a realistic ability to confront and rebut testimony concerning such testing pursuant to the Constitution of the State of Colorado and the United States Constitution.
9. Mr. Alissa also hereby requests that the prosecution refrain from any scientific testing in this case until Mr. Alissa's expert(s) are present and able to observe the testing procedures.

10. Mr. Alissa also requests and demands of the prosecution that it refrain from conducting any such testing until such time as the issue of a defense expert observing testing is resolved.
11. Mr. Alissa makes this motion, and all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the due process, trial by jury, right to counsel, equal protection, cruel and unusual punishment, confrontation, compulsory process, right to remain silent, and right to appeal clauses of the federal and Colorado constitutions, and the first, fourth, sixth, eighth, ninth, tenth, and fourteenth amendments to the United States Constitution, and article II, sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25, and 28 of the Colorado Constitution.
12. Mr. Alissa requests a hearing on this motion.

MEGAN A. RING
COLORADO STATE PUBLIC DEFENDER

/s/Samuel Dunn
Samuel Dunn #46901
Deputy State Public Defender

/s/Kathryn Herold
Kathryn Herold #40075
Supervising Deputy State Public Defender

Dated: March 23, 2021

Certificate of Service

I hereby certify that on March 23_, 2021, I served the foregoing document by E filing same to all opposing counsel of record.

/s/ Sam Dunn